IN THE

Supreme Court of the United States

October Term, 1944.

No. 933

NATIONAL MEMORIAL PARK, INC., *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

LLEWELLYN A. LUCE,
937 Munsey Bldg.,
Washington, D. C.,
Counsel for Petitioner.

WILSON PRINTING CO., WASHINGTON 1, D. C.,—BRANCH P. EPES, MANAGER

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To the Honorable the Supreme Court of the United States:

National Memorial Park, Inc., a corporation, by its attorney prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, entered in the above entitled cause on November 13, 1944, affirming a decision of the Tax Court of the United States.

OPINIONS BELOW

The memorandum opinion of the Tax Court of the United States is unreported but is contained in the transcript of record, pages 36 to 55, inclusive.

The opinion of the Circuit Court of Appeals is unreported but may be found at Paragraph 62,801, Volume 4, 1944 Edition, Prentice-Hall Tax Service. (See also R 64-77).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 13, 1944 (R 77). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U.S.C.A. § 347).

STATUTES INVOLVED

The statutes involved are set out in the Appendix, *infra*, (pp. 25-27).

STATEMENT OF FACTS

The action below was an appeal by the taxpayer from the decision of the Tax Court of the United States in which a judgment was rendered in favor of the Commissioner (R. 55).

The facts, as found by the Circuit Court of Appeals, are as follows (R. 64-77):

Petitioner is a Delaware corporation, organized September 7, 1933, engaged during the years in question in the business of operating a cemetery, known as "National Memorial Park", located in Fairfax County, Virginia.

Sometime during 1933, at a cost of $32,202.32, petitioner acquired 92,986 acres of land in Virginia. This acreage was plotted into 24,429 salable four-grave cemetery lots. The balance was unsalable property, such as roads and paths.

On June 22, 1934, pursuant to a resolution adopted by petitioner's board of directors on June 12, 1934, peti-

tioner entered into a trust agreement with the City National Bank of Philadelphia. Under the terms of this agreement, the City National Bank was to act as trustee, and all moneys received from the sale of burial lots were to be deposited with the Trustee as Depository.

Certain provisions of the trust agreement which are particularly germane to the questions on appeal are herein set forth *ipsissimis verbis*:

"* * * No sections of lots in the Memorial Park shall be sold unless an initial cash payment of at least 20% of the purchase price is made by the purchaser at the time of the execution of the contract of sale. Upon receipt of such payment of 20% the trustee shall credit the same to the General Fund.

"* * * Each subsequent payment made by the purchaser of a section or lot in the Memorial Park when received by the trustee shall be credited by it to the General Fund, until one-half of the purchase price is paid when the balance of payments shall be apportioned as follows:

(a) Perpetual Maintenance Fund	20%
(b) Improvement Fund	40%
(c) General Fund	40%
Total	100%

so that when payment is made in full by the purchasers of a section or lot in the Memorial Park the Trustee shall have credited the same as follows:

(a) Perpetual Maintenance Fund	10%
(b) Improvement Fund	20%
(c) General Fund	70%
Total	100%

"* * * The Memorial Park covenants and agrees that each purchaser of a section or lot will receive a good and sufficient deed of right of sepulchre to such section or lot in the Memorial Park when payment of all installments of purchase price and interest have been made in full.

"* * * A sum equal to 10% of the gross proceeds of funds arising from the sale of sections or lots in the Memorial Park shall as above provided be set apart and shall constitute a Perpetual Maintenance Fund, for the perpetual care and preservation of the grounds and the repair and renewal of the Memorial Park. A total of 10% of the total purchase price of all sections of lots shall be deducted from the payments on account of the purchase price of said sections or lots in the respective percentages hereinbefore enumerated. The principal of such fund shall be held intact by the trustee and shall be invested in the manner hereinafter stated, and the net income from the principal of such fund shall be paid by the trustee to the Memorial Park. The Memorial Park covenants and agrees to use the income so received from the Perpetual Maintenance Fund for the perpetual care and preservation of the grounds, and the repair and renewal of the buildings and property of the Memorial Park.

"The principal of such Perpetual Maintenance Fund shall be invested and re-invested from time to time by the trustee in such securities as from time to time shall constitute a legal investment for trustees under the laws of the State of Pennsylvania.

* * *

"* * * 20% of the total selling price of all sections or lots in the Memorial Park shall be set aside and shall constitute an Improvement Fund. The moneys so set apart for the Improvement Fund shall be expended

for the purpose of developing, enlarging, improving and beautifying the Memorial Park, including the landscaping of the grounds, construction of roads, entrances, walls and a memorial chapel, the purchase or (sic.) equipment, and for any other charges which, in the judgment of the Board of Directors of the Memorial Park, shall be necessary or proper for the establishment of a Memorial Park or burial ground to be known as National Memorial Park.

"Payments from such Improvement Fund shall be made by trustee upon the following terms and conditions:

"(a) Upon presentation of a certificate of the architects or engineers having supervision of the particular work or improvement, certifying that the amount or amounts specified are due for labor and material furnished, or expenses incurred in the improvement of the Memorial Park provided, however, that such certificate shall be accompanied by the written approval of the officers of the Memorial Park who shall be authorized to approve the same.

"(b) Upon presentation of bills or statements of architects, engineers, attorneys or any other persons who have performed services or incurred expenses in connection with the improvement of the Memorial Park, under the direction of the proper officers of the Memorial Park, where such services are not performed under the supervision of any architect or engineer, and where such bills or statements are accompanied by the written approval of the officers of the Memorial Park who shall be authorized to approve the same.

"(c) Upon presentation by the officers of the Memorial Park of cancelled checks or other evidence satisfactory to the trustee showing amounts expended in purchasing and acquiring title to real estate for the purpose of the Memorial Park, together with a certified copy of a resolution of the Board of Directors of the Memorial Park

certifying that the amounts specified have been expended for such purpose, and requesting the trustee to reimburse the Memorial Park out of the Improvement Fund for such expenditures.

"(d) Payments not in excess of the sum of $150.00 shall be made upon receipt of a written requisition, signed by the President and Comptroller."

The moneys deposited in the General Fund were subject to the disposition of petitioner with no supervision or control by the trustee. Nor was the trustee under any obligation to see to the application of any of the money so paid to petitioner. A further provision of the agreement provided:

"It is agreed by and between the parties hereto, however, that in order that lots may be properly conveyed as sold that the said Memorial Park will immediately upon the execution hereof and from time to time thereafter as the same may become necessary, convey to the trustee by good and sufficient deed of conveyance title in fee to the ground upon which are located no less than three thousand (3,000) lots free of mortgage lien, and does hereby covenant and agree to and with the said trustee not to sell or dispose of the right of sepulchre to any section or lot other than those lots to which title has been conveyed to the trustee as aforesaid, and the trustee for its part agrees that it will hold title to such ground as may be conveyed to it in accordance with the terms hereof as trustee for the said Memorial Park and its assigns, and that it will upon receipt of the purchase price from individual purchasers convey by approved deed sections or lots and the right of sepulchre therein to the purchasers thereof, and that it will not in any manner or form alien or encumber the said ground, but will hold it solely for the uses and purposes herein specified."

On December 10, 1934, in compliance with the terms of the trust agreement, petitioner conveyed 3,004 lots to the nominee of City National Bank, and on December 6,

1937, the entire property of the cemetery was conveyed to the bank's nominee.

By the terms of the sales contracts used by petitioner during the years in question, petitioner agreed, upon full payment being made by the purchaser, to deliver "good and sufficient deed" to the allotted section, and further to set aside and build up a maintenance and an improvement fund. The contracts of sale were received in petitioner's office, together with the down payments.

When, and only when, 20 percent or more of the sales price had been paid, petitioner deposited the money collected in the Hamilton National Bank for the account of City National Bank, at which time a statement called a "collection advice," listing the amounts received from each customer and the allocation of these amounts to the various funds, was prepared and sent to City National Bank. If the purchaser did not complete payments up to 20 percent of the purchase price, the money was retained by petitioner.

When the final payment was made by the purchaser, petitioner delivered a deed, executed by the bank or its nominee, to the purchaser. These deeds provided in part as follows:

"That the said Grantor for and in consideration of the sum of $10.00 . . . * * * and other good and valuable considerations * * * has granted, bargained, sold, released, conveyed and confirmed, and by these presents does grant, bargain, sell, release, convey and confirm unto the said Grantee his heirs and assigns, subject to the conditions and restrictions hereinafter set forth, the right of sepulchre and the right to the exclusive use, occupation and possession for that purpose only in the lot of ground in the said National Memorial Park. * * *

"The said Grantor as aforesaid, hereby covenants to and with the said party of the second part, his heirs and assigns, that of the purchase price of all cemetery lots in

this said Park there will be set aside thirty (30%) percent, of which fund the City National Bank of Philadelphia shall be trustee; one third of this said fund shall be capitalized and held intact and the income therefrom shall be used solely and perpetually for the purpose of maintenance and preservation of the said Memorial Park and for the proper upkeep thereof and the other two-thirds thereof shall be used to erect buildings and make improvements."

When petitioner expended money for improvements it forwarded to the City National Bank a statement called "improvement certificate" which showed the amount expended for each improvement and certified that such amounts had been so spent. These certificates were either approved or disapproved by the bank and then, as money accumulated in the improvement fund, the bank made reimbursement to petitioner and applied the reimbursement against the sum which had been certified to the bank by petitioner.

The amounts of the improvement certificates certified by petitioner, and the amounts paid thereon by City National Bank during the taxable years, are as follows:

	Improvement Certificate	*Amount Paid*
1935	$31,625.05	$13,794.82
1936	46,603.15	57,761.85
1937	52,425.69	51,887.52

During the same period petitioner spent the following amounts for improvements:

1935	$79,699.83
1936	39,582.57
1937	47,234.85

In filing its returns for the taxable years, petitioner took the position that it was regularly engaged in selling

personal property. In its returns petitioner answered the question as to the basis of the return by writing in the word "installment". Petitioner's books were kept on the accrual basis. In computing its gross income for these years petitioner excluded 30.64 percent of its cash collections for each year. The figure, 30.64 percent, was computed in this manner: maintenance fund, 10 percent; improvement fund, 20 percent; and land cost, .64 percent. Petitioner's returns for the years 1935 and 1937 were not filed within the time prescribed by law.

It was the Commissioner's contention that petitioner was engaged in selling realty, not personalty, and thus is brought within the ambit of section 44(b) of the Revenue Acts of 1934, 1936 and 1938, and Articles 44-2 and 44-3 of Regulations 86, 94 and 101; that petitioner was not permitted to use the installment basis for reporting profit from lot sales. The Commissioner further contended that the amounts representing 20 percent of the sales price of lots sold in the taxable years were not impressed with a trust in the "Improvement Fund".

The Tax Court sustained the position of the Commissioner in every instance except one, (with which we are not here concerned) and from this decision the petitioner has duly appealed.

The Circuit Court of Appeals affirmed the decision of the Tax Court of the United States and held:

1. That the improvement fund of 20% of the annual collections from the sales of "rights of sepulture" could not be excluded from the petitioner's gross income because the improvement fund was not a trust fund or for the benefit of the owners of "rights of sepulture".

2. That petitioner could not report its income as a dealer in personal property because the petitioner's sales of "rights of sepulture" constituted sales of real property rather than sales of personal property.

QUESTIONS PRESENTED

The case presents the following questions:

1. Whether the Improvement Fund was a trust fund for the benefit of the owners of "rights of sepulture" and thus properly excluded by petitioner from its gross income.

2. Whether the sales by petitioner of "rights of sepulture" constituted sales of personal property or sales of real estate.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In deciding that the Improvement Fund was not a trust fund for the benefit of the owners of "rights of sepulture" and thus properly excluded by petitioner from its gross income for the years here involved.

2. In deciding that petitioner was not a dealer in personal property within the meaning of Section 44(a) of the Revenue Acts of 1934 and 1936.

3. In deciding that the sales by petitioner of "rights of sepulture" constituted sales of real property rather than sales of personal property.

4. In failing to follow for Federal tax purposes the weight of modern authority throughout the United States that sales of certificates of "rights of sepulture" constitute sales of securities and thus sales of personal property rather than sales of real estate.

5. In affirming the decision of the Tax Court of the United States.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The decision of the Circuit Court of Appeals herein is in direct conflict with the decision of the United States Circuit Court of Appeals for the Ninth Circuit in *Portland Cremation Association* v. *Commissioner,* 31 F. (2d) 843.

2. Under the law of the State of Virginia (where the cemetery here involved is located) sales of "rights of sepulture" do not convey "an estate in land", but the law is not settled as to whether such sales constitute sales of personal property or sales of real estate. *Grinnan* v. *Fredericksburg Lodge, No. 4 A. F. & A. M.,* 118 Va. 588, 88 S. E. 79; *Roanoke Cemetery* v. *Goodwin,* 101 Va. 605, 44 S. E. 796; *Goldman* v. *Mollen,* 168 Va. 345, 191 S. E. 627.

However in the construction of a taxing statute of the United States, the law of the state in which the land involved is situated does not necessarily govern and need not be followed with respect to interests transferred by sale. *Rosenberger* v. *McCaughn* (C. C. A. 3) 25 F. (2d) 699, certiorari denied, 278 U. S. 604.

The Federal law or the weight of authority throughout the United States rather than State law should be followed in construing sales contracts such as those here involved for Federal tax purposes. *Burnet* v. *Harmal,* 287 U. S. 103; *Burke-Waggoner Oil Assn.* v. *Hopkins,* 269 U. S. 110. Please see also *Von Baumbach* v. *Sargent Land Co.,* 242 U. S. 503; *Stratton's Independence* v. *Howbert,* 231 U. S. 399; and *Stanton* v. *Baltic Mining Co.,* 240 U. S. 103.

4. Under the weight of authority throughout the United States, sales of "rights of sepulture" constitute sales of personal property. *Holloway et al.* v. *Thompson et al.,* decided by the Appellate Court of Indiana on June 16,

1944 and reported in 42 N. E. (2d) 421; *Paul* v. *Walkerton, etc. Cemetery Assn.*, 1933 204 Ind. 693, 184 N. E. 537; *Clarke* v. *Keating*, 170 N. Y. S. 187, 193 App. Div. 212. *In re Waldstein*, 160 Misc. 763, 291 N. Y. S. 697; 10 *American Juris*, Section 22, page 503; 14 C. J. S., Cemeteries, Section 25, page 84. Please see also the following earlier authorities: *Kincaid's Appeal*, 66 Pa. St. 411, 5 Am. Rep. 377; *Partridge* v. *The First Independent Church of Baltimore*, 29 Md. 631; *Bessemer Land Co.* v. *Jenkins*, 111 Ala. 135, 18 South. 565, 56 Am. St. Rep. 26.

5. The Circuit Court of Appeals has decided two important questions of Federal tax law which have not been but should be settled by this Court. The questions involved are important to all cemeteries and sellers of "rights of sepulture".

BRIEF IN SUPPORT OF PETITION

I.

IF A PRESCRIBED PART OF THE SALES PRICE OF THE "RIGHTS OF SEPULTURE" WAS RECEIVED IN TRUST, SUCH PART HAS BEEN PROPERLY EXCLUDED BY PETITIONER FROM GROSS INCOME.

The following appears well settled by the decisions of the courts: where a trust, recognized by law, whether express or implied, is created or exists, and a prescribed portion of the contract price received for a cemetery lot or "right of sepulture" is received under or in trust for the maintenance or improvement of the cemetery or lots, such portion of the contract price is excluded from the gross income of the cemetery company. If no portion of the contract price is received in trust, but a part thereof is immediately turned over to an established trust, such portion is deductible. *American Cemetery Co.* v. *U. S.* (D. C.) 28 F. (2d) 918; *Troost Ave. Cemetery Co.* v. *U.*

S., (D. C.) 21 F. (2d) 194; *Los Angeles Cemetery Assn.* 2 B. T. A. 495, Dec. 713 (Acq.); *Greenwood Cemetery Assn.*, 2 B. T. A. 910, Dec. 869 (Acq.); *Metairie Cemetery Assn.*, 4 B. T. A. 903, Dec. 1634 (Acq.); *Troost Ave. Cemetery Assn.*, 4 B. T. A. 1169, Dec. 1732 (Acq.); *Inglewood Park Cemetery Assn.*, 6 B. T. A. 386, Dec. 2213 (Non-acq.). *Evergreen Cemetery Assn. of Chicago*, 21 B. T. A. 1194; G.C.M. 8446, Cumulative Bulletin IX-2, pages 370, 371.

In G.C.M. 8446, supra, the General Counsel of the Bureau of Internal Revenue concluded: "that a trust fund was created in which the purchaser of a lot had such an equitable interest as might be enforced upon application to a court of equity by petition asking for specific performance, and that such trust fund was irrevocable, both as to principal and income therefrom".

The General Counsel then held that monies from the sale of lots passing into the trust fund did not constitute part of the taxpayer's gross taxable income.

II.

AN EXPRESS TRUST WAS CREATED, ESTABLISHED AND CARRIED OUT IN THIS CASE.

It is respectfully submitted that the Findings of Fact made by the Tax Court demonstrates that an express trust was created and carried out in this case and that the improvement funds here involved were both received in trust and turned over to the trustee of the trust which had been created. (R. 23-36).

City National Bank of Philadelphia was designated by petitioner's Board of Directors as trustee.

A trust agreement was made and entered into by petitioner with City National Bank of Philadelphia on June 22, 1934. The City National Bank of Philadelphia was designated in this trust agreement as trustee.

The petitioner operated under this trust agreement during the years 1935, 1936 and 1937 and under the trust agreement as amended in the month of December, 1937.

The trust agreement of June 22, 1934 was ratified by a special meeting of petitioner's Board of Directors.

On December 10, 1934 the petitioner, pursuant to the provisions of the trust agreement, conveyed 3004 lots to the nominee of the City National Bank.

On December 6, 1937, pursuant to the provisions of the trust agreement as amended, petitioner deeded to the nominee of the City National Bank the balance of the tracts or parcels of land in the cemetery.

The indentures or deeds to the purchaser of "rights of sepulture" were executed by the City National Bank or by its nominee as grantor and delivered by the petitioner to the purchaser.

The petitioner's collections on contract sales were deposited to the account of City National Bank.

A collection advice was prepared by petitioner's officers and sent to the trustee bank, showing the amounts received from each customer and allocation of the collections and the funds to which they were applicable was made by petitioner in accordance with the trust agreement.

When the final payment was made on a contract, the indenture to the purchaser was forwarded to the trustee bank for execution and then was delivered by petitioner to the purchaser.

When the collections were received by the bank from the petitioner, the bank then notified the petitioner that the same had been received and that the monies had been allotted to the various funds provided for by the trust agreement.

The City National Bank, Trustee, maintained an account with the Pennsylvania Company, in which the trust funds were deposited and upon which the checks to petitioner for improvements were drawn.

The petitioner maintained a separate and distinct bank account for its own purposes, entitled National Memorial Park Operating Account.

It became necessary for the petitioner to spend its own funds and make advances for improvements prior to the time when there were sufficient accumulations in the improvement fund. However, the petitioner prepared and sent to the trustee certificates for these monies spent for improvements certifying that the monies had been spent.

The certificates for improvements were checked and verified by the bank's representatives and adjustments were, in certain instances, as required by the bank.

When the certificates for improvements had been approved by the bank, funds were remitted to the petitioner from the improvement fund by the bank to cover the advance made by petitioner. Such funds were remitted by the bank when the accumulations in the improvement fund reached a sufficient amount to reimburse the petitioner and when the expenditures by petitioner for improvements as shown by the certificates were approved by the bank.

The Tax Court also found that the bank, as trustee, actually executed the deed or indenture to the purchaser (R. 31), and that the said deed itself referred to the fund of which the bank was trustee which the grantor actually covenanted would be set aside for maintenance and improvements (R. 32).

III.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN DIRECT CONFLICT WITH THE DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT IN PORTLAND CREMATION ASSOCIATION v. COMMISSIONER, 31 F. (2d) 843.

The Circuit Court of Appeals held that the Improvement Fund here involved was not received upon trust or impressed with a trust substantially because of the discretion and control lodged in petitioner with respect to the Improvement Fund (R. 74). We think that the decision of the court below is in direct conflict with the decision of the United States Circuit Court of Appeals for the Ninth Circuit in *Portland Cremation Association* v. *Commissioner, supra* (31 F. (2d) 843).

In the Portland Cremation Association case it was held that a covenant, in the Cremation Association's deed to the purchaser of sepulture rights, providing that a portion of the purchase price would be placed in a maintenance fund, without indicating any specific portion to be used, was sufficient to impress the fund to be set aside with a trust. The provisions with respect to creating the fund or trust were contained in the resolutions of the company's Board of Directors and in the deed to the purchaser.

In the case at bar the trust was express. A trust agreement was actually entered into and the deed from the trustee to the purchaser contained the following provision (R. 31-32):

* * *

> "The said Grantor as aforesaid, hereby covenants to and with the said party of the second part, his heirs and assigns, that of the purchase price of all cemetery lots in this said Park *there will be set aside thirty (30%) percent, of which fund the City National*

Bank of Philadelphia shall be trustee; one third of this said fund shall be capitalized and held intact and the income therefrom shall be used solely and perpetually for the purpose of maintenance and preservation of the said Memorial Park and for the proper upkeep thereof and *the other two-thirds thereof shall be used to erect buildings and make improvements.*" (Italics supplied)

* * *

Thus, there was a covenant between the trustee and the purchaser providing that twenty percent of the purchase price would be used to erect buildings and make improvements. The case at bar is a much stronger case than *Portland Cremation Association* v. *Commissioner, supra,* because in the instant case there was not only a covenant in the deed providing for the improvement fund but a trust agreement was actually executed and the trustee or its nominee conveyed the property to each purchaser. In *Portland Cremation Association* v. *Commissioner* the Circuit Court of Appeals for the Ninth Circuit regarded the element of control as immaterial and in its opinion stated in part as follows:

* * *

"We cannot agree that the fund so set aside by the petitioner here is not essentially a trust fund.

* * *

"While the petitioner here may be said to have had control of the money which it had placed in the maintenance fund, diversion of that fund for corporation purposes or any purpose other than that designated by its promise to maintain the same, and the specific resolution of its board of directors to devote to that purpose 20 per centum of its receipts from sales might be enjoined by a suit in equity as a violation of the trust agreement. The crucial question is, Did the petitioner's patrons possess the right to protect themselves and demand the preservation of

the fund which the petitioner had covenanted with them to maintain and by its resolution had set apart for maintenance? That question is by the authorities answered in the affirmative, 26 R. C. L. 1359; *Rodney* v. *Shankland*, 1 Del. Chi. 35, 12 Am. Dec. 70; *Linnemann* v. *Moross*, 98 Mich. 178, 57 N. W. 103, 39 Am. St. Rep. 528."

* * *

In the instant case, as in the Cremation Association case, the purchasers had the right to rely on the covenant in the deed transferring the property to them and could protect themselves by demanding the preservation of the Improvement Fund and the use of the same for the erection of buildings and improvements and, as pointed out in the case of the Cremation Association, supra, they could have enforced these rights in a court of equity.

IV.

THE SALES OF "RIGHTS OF SEPULTURE" INVOLVED HEREIN CONSTITUTED SALES OF PERSONAL PROPERTY.

In filing its income tax returns for the years here involved the petitioner treated its sales as sales of personal property and filed its returns on the installment basis under Section 44(a) of the Internal Revenue Code. In this connection it is important to note just what was sold to purchasers. This is shown by the first paragraph of the indentures executed by City National Bank of Philadelphia or its nominee and delivered by the petitioner's representatives to the purchaser. The first paragraph of the indenture provides as follows:

> "That the said Grantor for and in consideration of the sum of $..... lawful money of the United States of Amercia and other goods and valuable considerations well and truly paid by the said Grantee at and before the sealing and delivery hereof, the

receipt whereof is hereby acknowledged, has granted, bargained, sold, released, conveyed and confirmed, and by these presents does grant, bargain, sell, release, convey and confirm unto the said Grantee heirs and assigns, subject to the conditions and restrictions hereinafter set forth, the *right of sepulture and the right to the exclusive use, occupation and possession for that purpose only in the lot of ground in the said National Memorial Park situate in Fairfax County, Virginia, and designated as* ." (Italics supplied)

From the above it appears that what the customer received was a certificate of the "right of sepulture." In urging that the sale of a "right of sepulture" is a sale of personal property, the petitioner relies on the Virginia case of *Grinnan and Others* v. *Fredricksburg Lodge No. 4, Ancient, Free and Accepted Masons and Others*, 118 Va. 588, 88 S. E. 79. This case involved the right of the order of Masons to remove certain bodies from a portion of a Masonic cemetery and inter them in other portions of the cemetery, the land from which said bodies were to be removed being used for the purpose of erecting a Masonic temple. Relatives of the deceased persons filed a chancery suit to enjoin the removal of the bodies. In the lower court a temporary injunction was awarded, which was dissolved on final hearing and the final decree of the lower court was affirmed on appeal.

In affirming the lower court Judge Harrison said the following at page 592-593 of the opinion:

"There is nothing in our statute law applicable to the facts here presented, nor is there anything in such statutes showing that the policy of this Commonwealth is averse to the removal of graves in a reverent and proper manner under all circumstances. Code 1904, sec. 1416-a. There can, however, be no question of the power of a court of equity to deal with a situation like the present, notwithstanding the absence of legislation on the subject, and authorize, in its sound judi-

cial discretion, the removal of graves or cemeteries in a proper case, after the consideration of all facts and with due regard to the rights and feeling of all concerned.

"The courts are much divided as to the character of the estate one may have in a burial lot in a cemetery. It is certain that it is not a fee. The weight of authority is, and we think the better view, that it is a mere privilege or license to make interments in the lot exclusively of others as long as the burying ground or cemetery remains as such. Kincaid's Appeal, 66 Pa. St. 411, 5 Am. Rep. 377; Partridge v. The First Independent Church of Baltimore, 39 Md. 631; Bessemer Land Co. v. Jenkins, 111 Ala. 135, 18 South. 565, 56 Am. St. Rep. 26.

"In Kincaid's Appeal, supra, the court held that 'The lot holder purchased a license—nothing more—irrevocable as long as the place continued a burying ground, but giving no title to the soil—But if in the course of time it should become necessary to vacate the ground as a burying ground, all that he could claim, in law or equity would be that he should have due notice and the opportunity afforded him of removing the bodies and monuments to some place of his own selection, or that, on his failing to do so, such removal should be made by others. He accepted the grant or license subject to this necessary condition!'

"In Roanoke Cemetery Co. v. Goodwin, 101 Va. 610, 44 S. E. 770, this court says 'that a purchaser of a lot in a cemetery does not acquire absolute right in, or dominion over, such lot, but merely a qualified and unsufructuary right for the purposes to which the lots are devoted.' "

It is respectfully noted that the Court pointed out in the Grinnan case that the character of an interest in a burial lot of a cemetery is a mere privilege or license. Also, the Court made it clear that the weight of authority is to the effect that such an interest is a mere privilege or license.

In Virginia, title to cemetery lots is not ordinarily absolute and a deed is not necessary. *Goldman et al.* v. *Mullen et al.*, 168 Va. 345, 191 S. E. 627.

The statment of the Court in the Virginia case of *Grinnan and Others* v. *Fredricksburg Lodge No. 4, Ancient, Free and Accepted Masons and Others, supra,* to the effect that the sale of a cemetery lot transfers a mere privilege or license is strengthened by the decisons of the New York Courts.

In *Clarke* v. *Keating,* 170 N. Y. S. 187, 193 App. Div. 212, the court held that the holder of a deed to a cemetery lot, however strong may be the wording of grant, even with the habendum using terms of inheritance, acquires only a privilege or license, exclusive of others to make interments in a lot purchased, so long as the lot remains a part of a cemetery.

While it appears that under the earlier decisions there was a division of authority on the proposition whether the purchaser of a cemetery lot or "right of seputure" acquires personal or real property, the recent decisions appear conclusive that the purchaser acquires personal property rather than real property.

The latest decision which counsel has been able to find is the case of *Holloway et al.* v. *Thompson et al.* decided by the Appellate Court of Indiana on June 16, 1942 and reported in 42 N. E. (2d) 421. In that case the Court held that the relation of an owner of a cemetery lot to the corporation having supervision over the cemetery is in many respects that of a corporation and a "stockholder," the interest of the stockholder being represented by lots instead of stock. The Court further held in that case that the sale of cemetery lots constituted sales of securities under the Indiana Securities Acts and that the seller was liable under the penalties, etc. prescribed by said Acts. At page 425 of 42 N. E. (2d) the Court declared:

"The owner of a cemetery lot is in a somewhat different position than the owner of an ordinary parcel of real estate. As our Supreme Court said in the case of Paul v. Walkerton, etc. Cemetery Assn., 1933, 204 Ind. 693, 184 N. E. 537, his relation to the corporation having supervision over the cemetery is in many respects that of a corporation and stockholder, the interest of the stockholder being represented by lots instead of stock. See also Certia v. University of Notre Dame Du Lac, 1925, 82 Ind. App. 542, 141 N. E. 381; and 10 American Juris. Section 22, page 503; 14 C. J. S., Cemeteries, Section 25, page 84.

"In the case of In re Waldstein, 1935, 160 Misc. 763, 291 N. Y. S. 697, the Supreme Court of New York examined a situation quite similar to the one here presented. The sale scheme was practically the same. The document issued to the purchaser was a certificate or deed granting rights of burial. Because the circumstances clearly disclosed that the sales were for investment and promotion that court held that securities were being issued under a New York Statute giving the Attorney General the right to investigate sales of securities within that state."

We think that under the law of Virginia, as well as the weight of modern authority throughout the United States, the sales in this case did not convey "an estate in land." *Grinnan and Others* v. *Fredricksburg Lodge No. 4, Ancient, Free and Accepted Masons and Others, supra*, and cases cited therein; *Clarke* v. *Keating, supra; Holloway et al.* v. *Thompson et al., supra*; *In re Waldstein*, 160 Misc. 763, 291 N. Y. S. 697, (Supreme Court of New York, 1935).

The document issued to the purchaser was a certificate granting the "right of sepulture" and the transaction between the petitioner and the purchaser constituted a sale of personal property. *Holloway et al.* v. *Thompson et al., supra; In re Waldstein, supra.* We believe that regardless of whether "the right of sepulture" is a mere

license or privilege that nevertheless the sales of the certificates constitute sales of securities and thus "sales of personal property" under the decisions of the Courts cited hereinabove construing the meaning of the term "securities" under the various State statutes enacted for the protection of investors. The salesmen of the petitioner were "security" salesmen; the petitioner regularly sold and disposed of "securities" on the installment plan; and accordingly the petitioner was a "Dealer in Personal Property" within the meaning of Section 44(a) of the Internal Revenue Code. The salesmen certainly did not sell an interest in land.

We think that the Federal law or the weight of authority throughout the United States rather than State law should be followed in construing sales contracts for Federal tax purposes. *Burnet* v. *Harmal*, 287 U. S. 103; *Burke-Waggoner Oil Assn.* v. *Hopkins*, 269 U. S. 110. Please see also *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503; *Stratton's Independence* v. *Howbert*, 231 U. S. 399; and *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103; *Rosenberger* v. *McCaughn*, 25 F. (2d) 699, certiorari denied, 278 U. S. 604.

We also believe that under the weight of authority throughout the United States sales of "rights of sepulture" constitute sales of personal property. *Holloway et al.* v. *Thompson et al., supra, Paul* v. *Walkerton, etc. Cemetery Assn.*, 1933, 204 Ind. 693, 184 N. E. 537; *Clarke* v. *Keating, supra; In re Waldstein, supra;* 10 American Juris, Section 22, page 503; 14 C. J. S., Cemeteries, Section 25, page 84; Kincaid's Appeal, 66 Pa. St. 411, 5 Am. Rep. 377; *Partridge* v. *The First Independent Church of Baltimore*, 39 Md. 631; *Bessemer Land Co.* v. *Jenkins*, 111 Ala. 135, 18 South. 565, 56 Am. St. Rep. 26; Words and Phrases, Vol. 14, Page 54 et seq.; *Duff* v. *Keaton*, 124 Pacific 295, 33 Okla. 485, 16 Okla. 485; 184 Pacific 786.

Counsel for petitioner certifies that in his opinion this petition is well founded and is not interposed for delay.

It is respectfully submitted that this petition should be granted.

LLEWELLYN A. LUCE,

937 Munsey Bldg.,
Washington, D. C.,

Counsel for Petitioner.

APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year. (For use of inventories, see section 22(c).)

* * *

SEC. 44. INSTALLMENT BASIS.

(a) *Dealers in Personal Property.*—Under regulations prescribed by the Commissioner with the approval of the Secretary, a person who regularly sells or otherwise disposes of personal property on the installment plan may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the gross profit realized or to be realized when payment is completed, bears to the total contract price.

(b) *Sales of Realty and Casual Sales of Personalty.*—In the case (1) of a casual sale or other

casual disposition of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year), for a price exceeding $1,000, or (2) of a sale or other disposition of real property, if in either case the initial payments do not exceed 30 per centum of the selling price (or, in case the sale or other disposition was in a taxable year beginning prior to January 1, 1934, the percentage of the selling price prescribed in the law applicable to such year), the income may, under regulations prescribed by the Commissioner with the approval of the Secretary, be returned on the basis and in the manner above prescribed in this section. As used in this section the term "initial payments" means the payments received in cash or property other than evidences of indebtedness of the purchaser during the taxable period in which the sale or other disposition is made.

* * *

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

* * *

(b) *Adjusted Basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

(1) *General rule.*—Proper adjustment in respect of the property shall in all cases be made—

(A) for expenditures, receipts, losses, or other items, properly chargeable to capital account, including taxes and other carrying charges on unimproved and unproductive real property, but no such

adjustment shall be made for taxes or other carrying charges for which deductions have been taken by the taxpayer in determining net income for the taxable year or prior taxable years: * * *

The sections above quoted are similar to the same sections of the Revenue Act of 1936, c. 690, 49 Stat. 1648.

No. 983

In the Supreme Court of the United States

October Term, 1944

National Memorial Park, Inc., [illegible]

v.

Commissioner [illegible]

ON PETITION FOR [illegible]
STATES [illegible]
CIRCUIT

[illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 933

NATIONAL MEMORIAL PARK, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 23–54) is not reported. The opinion of the Circuit Court of Appeals (R. 64–77) is reported in 145 F. 2d 1008.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 13, 1944 (R. 77). The petition for a writ of certiorari was filed on February 9, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether twenty percent of taxpayer's annual cash collections from purchasers of cemetery lots may be excluded from its gross income on the theory that such an amount was set aside in trust in the form of an "improvement fund".

2. Whether the taxpayer may avail itself of the installment sales provisions of Section 44 of the Revenue Acts of 1934 and 1936, in cases in which the initial payments on the cemetery lots exceed thirty per cent of the selling price. This question turns upon whether the interests sold by taxpayer were personalty or realty.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are printed in the Appendix, *infra*, pp. 12–18.

STATEMENT

The pertinent facts as found by the Tax Court (R. 23–36) may be summarized as follows:

Petitioner was organized as a Delaware corporation in 1933 and during the years here involved operated a cemetery in Fairfax County, Virginia. In 1933 it acquired 92.986 acres of land, of which the suitable area was plotted into 24,429 salable four-grave cemetery lots. On June 22, 1934, pursuant to a resolution of the board of directors, taxpayer entered into a "trustee and depositors' agreement" with the City National Bank of Philadelphia. (R. 24.) This agreement provides, *inter*

alia, that no lots are to be sold in the cemetery unless at least twenty per cent of the purchase price is paid at the time of sale. This twenty percent is to be deposited with the bank and credited to a General Fund. Subsequent payments by the purchaser of a lot are to be credited to the General Fund until one-half of the purchase price is paid. Thereafter, the payments are to be apportioned as follows (R. 25):

(a) Perpetual Maintenance Fund	20%
(b) Improvement Fund	40%
(c) General Fund	40%

When payment is made in full the purchaser's account is to reflect the following allocation of the total purchase price (R. 25):

(a) Perpetual Maintenance Fund	10%
(b) Improvement Fund	20%
(c) General Fund	70%

Ten per cent of the gross proceeds is to be set aside as a Perpetual Maintenance Fund, the principal to be invested by the bank in accordance with Pennsylvania laws governing trustee investments and the net income to be paid to taxpayer; taxpayer "covenants and agrees" to use the income so received for perpetual care and maintenance of the grounds (R. 26). Twenty per cent of the total selling price is to be set aside as an Improvement Fund. This fund is to be expended for "the purpose of developing, enlarging, improving and beautifying the Memorial Park" (R. 26). Payments by the bank from the Improvement Fund are to be made upon presentation of proper

certificates of expenditures approved by taxpayer. If money is spent in acquiring title to real estate, the bank is required to reimburse the taxpayer upon presentation of "cancelled checks or other evidence", together with a copy of the resolution of taxpayer's board of directors. (R. 27.) Moneys which are not required to be set aside for the Perpetual Maintenance Fund or Improvement Fund are to be credited to the General Fund. This fund is subject to disposition by taxpayer without supervision or control of the bank. (R. 28.) The bank is under no duty or obligation to see that the moneys paid by it to taxpayer are applied in accordance with the terms of the agreement (R. 28).

During the years here involved, the sales contracts used by petitioner provided, *inter alia,* as follows (R. 29–30):

> The said party of the first part agrees to and with the said party of the second part that when payment in full has been made * * * in accordance with the provisions hereof, that good and sufficient deed to the said allotted section * * * conveying all rights therein * * * will be delivered subject, however, to the rules, regulations and provisions now or hereafter made governing the conduct of the said National Memorial Park.
>
> The said party of the first part agrees to set aside and build up a fund for the improvement and beautification of the en-

> tire Park * * * and in addition thereto create a maintenance fund for the perpetual care and upkeep of the said Park.

When the down payment was twenty percent or more of the sales price, taxpayer deposited the money in the Hamilton National Bank for the account of City National Bank. A so-called "collection advice" was then prepared by petitioner in which the amounts received from each customer during a particular day and the allocation of such amounts to the various funds in accordance with the agreement were set forth. The collection advice was then forwarded to the City National Bank. All collections were allocated to the General Fund until fifty percent of the total installment payments had been made by the customer. (R. 30–31.)

When customers paid less than twenty percent of the purchase price, the collections from such sales were not forwarded to the City National Bank and the money was retained by petitioner until further payments were made (R. 31).

When the last payment due from the purchaser was made, indentures were executed by the Bank or its nominee (R. 29, 31). These provided, *inter alia,* that (R. 31–32):

> the said Grantor * * * does grant * * * unto the said Grantee his heirs and assigns, subject to the conditions and restrictions hereinafter set forth, the right of sepulture and the right to the exclusive

use, occupation and possession for that purpose only in the lot of ground in the said National Memorial Park.

The said Grantor * * * hereby covenants to and with the said party of the second part, his heirs and assigns, that of the purchase price of all cemetery lots in this said Park there will be set aside thirty (30%) percent, of which funds the City National Bank of Philadelphia shall be trustee; one-third of this said fund shall be capitalized and held intact and the income therefrom shall be used solely and perpetually for the purpose of maintenance and preservation of the said Memorial Park and for the proper upkeep thereof and the other two-thirds thereof shall be used to erect buildings and make improvements.

During the years 1935, 1936, and 1937, taxpayer remitted the following amounts to the City National Bank (R. 33):

1935	$140,525.75
1936	365,543.00
1937	301,698.39

The amounts of the improvement certificates certified by taxpayer and the amounts paid thereon by the Bank are as follows (R. 33):

	Improvement certificates	*Amounts paid*
1935	$31,625.05	$13,794.82
1936	46,603.15	57,761.85
1937	52,425.69	51,887.52

During the same period, taxpayer spent the following amounts for improvements (R. 33):

1935	$79,699.83
1936	39,582.57
1937	47,234.85

The following amounts were set up by taxpayer in an account captioned "Reserve for Improvements" (R. 35):

1934	85,203.65
1935	108,248.42
1936	56,513.36
1937	65,649.06
1938	17,554.13

In filing its returns for the taxable years, taxpayer reported its income as derived from the sale of personal property on the installment basis. In computing its gross income it excluded 30.64 per cent of its cash collections for the year on the basis of the following calculations: Maintenance Fund—10 per cent, Improvement Fund—20 per cent, and land cost—0.64 per cent. (R. 35.)

The Commissioner determined that "the installment basis for reporting profit from lot sales is not permissible since the method of reporting does not conform to the requirements of section 44 (b) of the Revenue Acts of 1934, 1936, and 1938, and Articles 44–2 and 44–3 of Regulations 86, 94 and 101" (R. 35). He computed taxpayer's net taxable income on the basis of net profit realized from the lot sales in each of the taxable years. In computing the cost basis of each year's sales, the Commissioner added the cost of land improvements to the original cost by way of a proportionate allocation. (R. 35–36.) The ten per cent of sales receipts paid into the

Perpetual Maintenance Fund was excluded from gross income (R. 36).

The Tax Court sustained the Commissioner except that it permitted the taxpayer to use the installment sales provisions of Section 44 (b) which apply to sales in which the initial payment from a customer is less than thirty per cent of the contract price (R. 36–55). On appeal, the Circuit Court of Appeals affirmed (R. 64–77).

ARGUMENT

1. Apart from the issue as to the applicability of Section 44 (a) to taxpayer's sales (*infra*, p. 11, point 3), the questions of law which taxpayer seeks to have this Court decide and as to which it asserts that there is a conflict of decisions are not raised on this record. As the Tax Court noted (R. 38–39), "petitioner has not offered any evidence to show what amount of the sum excluded from gross income in each year was allocated by the bank and credited to either the General Fund or the Improvement Fund under the 1934 agreement". The Tax Court found that "all collections were allocated to the general fund until 50 per cent of the total installment payments had been made by the customer" (R. 31), but pointed out (R. 38) that "there has been no break-down by petitioner for any one of the taxable years to show what amounts received in the taxable years represent payments on account of the first half of the purchase price, and payments on account

of the second half of the purchase price". Indeed, since taxpayer began to do business only two years before the taxable years here involved, it is reasonable to assume that a substantial portion of taxpayer's receipts were on account of new contracts and so largely allocable, as payments of the first fifty per cent, to the General Fund (R. 38).

2. In any event, the Improvement Fund had a heterogeneous character which excluded it on several counts from a "trust fund" classification: (1) The "trustee" bank was responsible neither to purchaser (R. 73) nor to taxpayer (R. 67) as to the final application of the moneys disbursed from the Improvement Fund; (2) the use of the money was controlled by taxpayer; (3) there was no essential relationship in the taxable years between the amounts paid by the bank to taxpayer against improvement certificates and the total amount paid by taxpayer to the bank; and (4) the taxpayer was privileged to use the Improvement Fund to enlarge the cemetery as well as to develop and beautify it. As the court below so aptly put it (R. 73):

> In the instant case the improvement fund, denuded by the impact of surrounding facts, proves to be nothing more than a conduit, channelling the money from the purchaser to the beneficial use of the petitioner. * * *

Practically none of the *indicia* of a trust, except perhaps the label, exists in this instance. The

Tax Court and the Circuit Court of Appeals were plainly correct in concluding that the Improvement Fund was not impressed with a trust.[1]

The taxpayer asserts that the decision below is in conflict with *Portland Cremation Ass'n* v. *Commissioner*, 31 F. 2d 843 (C. C. A. 9th) (Br. 16). But the fund there involved was a permanent maintenance fund, similar to taxpayer's Permanent Maintenance Fund (see note 1, p. 10), not its Improvement Fund, and the purchasers of the niches and vaults possessed (p. 846) "the right to protect themselves and demand the preservation of the fund." In the instant case taxpayer's agreement with the bank provided (R. 28):

> * * * The trustees shall be under no duty or obligation to see to the application of any of the moneys paid by it under the terms of this agreement to the Memorial Park, in the manner herein provided.

Such remedy as the purchaser may have is of a contractual nature based upon the purchaser's agreement with the taxpayer (*supra*, pp. 4–6). But the equitable right of a beneficiary against the trustee which the court found available in the *Portland Cremation* case, where the cemetery itself

[1] The Commissioner conceded taxpayer's right to exclude ten percent of the annual cash receipts from gross income for the Perpetual Maintenance Fund, the principal of which was to be "held intact by the trustee and shall be invested" and the net income of which was to be used by taxpayer for the perpetual care and preservation of the grounds (R. 36).

was the trustee, is not available to the purchaser in the instant case.

3. Whether state or federal law controls the application of Section 44 (Appendix, *infra*, pp. 12–13), taxpayer was engaged in the sale of realty. The Virginia Supreme Court of Appeals has settled the nature of interests like those sold by taxpayer in *Goldman* v. *Mollen*, 168 Va. 345, 355, in which it designated the cemetery lot-holder's right as one "in the nature of a permanent easement." Moreover, the Commissioner has long taken the position that the term "real property" as used in Section 44 (b) includes rights in land as well as the land itself (R. 76–77). Accordingly, the sale of the "easement" was correctly held by the court below to come within the ambit of Section 44 (b).

CONCLUSION

The decision of the court below is correct and there is no conflict. The petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
ERNEST R. MORTENSON,
Special Assistants to the Attorney General.

MARCH 1945.

APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year. (For use of inventories, see section 22 (c).)

* * * * *

SEC. 44. INSTALLMENT BASIS.

(a) *Dealers in Personal Property.*—Under regulations prescribed by the Commissioner with the approval of the Secretary, a person who regularly sells or otherwise disposes of personal property on the installment plan may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the gross profit realized or to be realized when payment is completed, bears to the total contract price.

(b) *Sales of Realty and Casual Sales of Personalty.*—In the case (1) of a casual sale or other casual disposition of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year), for a price exceeding $1,000, or (2) of a sale or other disposition of real property, if in either case the initial payments do not exceed 30 per centum of the selling price (or, in case the sale or other disposition was in a taxable year beginning prior to January 1, 1934, the percentage of the selling price prescribed in the law applicable to such year), the income may, under regulations prescribed by the Commissioner with the approval of the Secretary, be returned on the basis and in the manner above prescribed in this section. As used in this section the term "initial payments" means the payments received in cash or property other than evidences of indebtedness of the purchaser during the taxable period in which the sale or other disposition is made.

* * * * *

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

* * * * *

(b) *Adjusted Basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

(1) *General rule.*—Proper adjustment in respect of the property shall in all cases be made—

(A) for expenditures, receipts, losses, or other items, properly chargeable to capital

account, including taxes and other carrying charges on unimproved and unproductive real property, but no such adjustment shall be made for taxes or other carrying charges for which deductions have been taken by the taxpayer in determining net income for the taxable year or prior taxable years; * * *

The sections above quoted are similar to the same sections of the Revenue Act of 1936, c. 690, 49 Stat. 1648.

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

> ART. 44–1. *Sale of personal property on installment plan.*—Dealers in personal property ordinarily sell either for cash or on the personal credit of the purchaser or on the installment plan. Dealers who sell on the installment plan usually adopt one of four ways of protecting themselves in case of default—
>
> (a) By an agreement that title is to remain in the vendor until the purchaser has completely performed his part of the transaction;
>
> (b) By a form of contract in which title is conveyed to the purchaser immediately, but subject to a lien for the unpaid portion of the selling price;
>
> (c) By a present transfer of title to the purchaser, who at the same time executes a reconveyance in the form of a chattel mortgage to the vendor; or
>
> (d) By conveyance to a trustee pending performance of the contract and subject to its provisions.
>
> The general purpose and effect being the same in all of these cases, the same rule is uniformly applicable. The general rule

prescribed is that a person who regularly sells or otherwise disposes of personal property on the installment plan, whether or not title remains in the vendor until the property is fully paid for, may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the total or gross profit (that is, sales less cost of goods sold) realized or to be realized when the property is paid for, bears to the total contract price. Thus the income of a dealer in personal property on the installment plan may be ascertained by taking as income that proportion of the total payments received in the taxable year from installment sales (such payments being allocated to the year against the sales of which they apply) which the total or gross profit realized or to be realized on the total installment sales made during each year bears to the total contract price of all such sales made during that respective year. No payments received in the taxable year shall be excluded in computing the amount of income to be returned on the ground that they were received under a sale the total profit from which was returned as income during a taxable year or years prior to the change by the taxpayer to the installment basis of returning income. But in the case of any taxpayer who, by an original return made prior to February 26, 1926, changed the method of reporting his net income for the taxable year 1924 or any prior taxable year to the installment basis, see section 705 of the Revenue Act of 1928. Deductible items are not to be allocated to the years in which the profits from the sales of a particular year are to be returned as income, but must

be deducted for the taxable year in which the items are "paid or incurred" or "paid or accrued," as provided by sections 43 and 48. A dealer who desires to compute his income on the installment basis shall maintain books of account in such a manner as to enable an accurate computation to be made on such basis in accordance with the provisions of this article.

* * * * *

If the vendor chooses as a matter of consistent practice to return the income from installment sales on the straight accrual or cash receipts and disbursements basis, such a course is permissible.

* * * * *

ART. 44–2. *Sale of real property involving deferred payments.*—Under section 44 deferred-payment sales of real property include (a) agreements of purchase and sale which contemplate that a conveyance is not to be made at the outset, but only after all or a substantial portion of the selling price has been paid, and (b) sales in which there is an immediate transfer of title, the vendor being protected by a mortgage or other lien as to deferred payments. Such sales, either under (a) or (b), fall into two classes when considered with respect to the terms of sale, as follows:

(1) Sales of property on the installment plan, that is, sales in which the payments received in cash or property other than evidences of indebtedness of the purchaser during the taxable year in which the sale is made do not exceed 30 percent of the selling price;

(2) Deferred-payment sales not on the installment plan, that is, sales in which the payments received in cash or property other

than evidences of indebtedness of the purchaser during the taxable year in which the sale is made exceed 30 percent of the selling price.

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ART. 44–3. *Sale of real property on installment plan.*—In transactions included in class (1) in article 44–2 the vendor may return as income from such transactions in any taxable year that proportion of the installment payments actually received in that year which the total profit realized or to be realized when the property is paid for bears to the total contract price.

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If the vendor chooses as a matter of consistent practice to return the income from installment sales on the straight accrual or cash receipts and disbursements basis, such a course is permissible, and the sales will be treated as deferred-payment sales not on the installment plan.

* * * * *

ART. 113 (b)–1. *Adjusted basis: General rule.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, is the cost of such property or, in the case of such property as is described in paragraphs (1) to (16), inclusive, of section 113 (a), the basis therein provided, adjusted to the extent provided in section 113 (b).

The cost or other basis shall be properly adjusted for any expenditure, receipt, loss, or other item, properly chargeable to capital account, including the cost of improvements and betterments made to the property. * * * In the case of unimproved and unproductive real property, carrying

charges, such as taxes and interest, which have not been taken as deductions by the taxpayer in determining net income for the taxable year, or a prior taxable year, are properly chargeable to capital account.

Example: A, who makes his returns on the calendar year basis, purchased property in 1929 for $10,000. He subsequently expended $6,000 for improvements. Disregarding, for the purpose of this example, the adjustments required for depreciation, the adjusted basis of the property is $16,000. If A sells the property in 1936 for $20,000, the amount of his gain will be $4,000. As to the amount of such gain to be taken into account in computing net income, see section 117.

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The articles above quoted are similar to the same articles of Treasury Regulations 86, promulgated under the Revenue Act of 1934.

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